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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CAROLYN CORTINA et al.,

Plaintiffs and Respondents,

v.

NORTH AMERICAN TITLE COMPANY,
INC.,

Defendant and Appellant.

F074938

(Super. Ct. No. 07CECG01169)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Y. Hamilton, Jr., Judge.

Morgan, Lewis & Bockius, and Deborah E. Quick for Defendant and Appellant.

No appearance for Plaintiffs and Respondents.

-ooOoo-

Defendant North American Title Company, Inc. (NATC), appeals from a posttrial order dismissing the claims of plaintiff Janet Doran without prejudice. Doran was one of several people who asserted causes of action against NATC “individually and as ‘[c]lass [r]epresentatives’” in a class action lawsuit. Nine of the class representatives testified at trial. Doran was one of three named plaintiffs who did not testify. The trial court ordered entry of judgment against two of the nontestifying plaintiffs but not Doran, the only distinction being Doran had supposedly “opted out” of the litigation before trial.

The narrow issue in this appeal is whether a class representative in a class action lawsuit can unilaterally withdraw from the case. We conclude the answer is no. Once the trial court has certified a class, the class representative owes fiduciary duties to the absent class members. Accordingly, the California Rules of Court require court approval of the dismissal of any party in a class action. In issuing the challenged order, the trial court apparently relied on a contrary assumption. We therefore reverse the order and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

In 2007, Carolyn Cortina filed a putative class action complaint against NATC alleging wage and hour violations under California law. In 2009, the complaint was amended to add four plaintiffs: Kimberly Baker, Judith Bates, Janet Doran, and Tina Texeira. On September 24, 2010, a second amended complaint was filed, which named an additional defendant, North American Services, Inc. (NAS), and eight more plaintiffs: Catherine Bell, Melodie Benton, Martha Dominguez, Cheryl Fuller, Robin Johnson, Laurel Johnstone, Teresa Spencer, and Mary Weidmark.

The operative pleading alleged four causes of action under the Labor Code and one cause of action under Business and Professions Code section 17200 et seq., also known as the unfair competition law (UCL). The trial court certified two of three classes identified in the pleadings, which it referred to as the “Exempt” and “Non-exempt” classes. Plaintiffs Cortina and Doran were found to be “typical representatives of the claims of the ‘exempt’ class.”

On August 31, 2011, an order of dismissal without prejudice was issued as to plaintiff Robin Johnson. In September 2015, all claims under the Labor Code were dismissed with prejudice, leaving only the UCL cause of action. According to the trial court’s register of actions, which is included in the record on appeal, these were the only dismissals ordered prior to the conclusion of trial.

On August 12, 2016, following an approximate 41-day bench trial, the trial court issued a tentative ruling. Relevant to the issue on appeal, the trial court stated its intention to enter judgment against plaintiff Cortina and in favor of NATC, noting Cortina had not testified at trial. The trial court further stated its intention to enter judgment against NATC and in favor of “Lori Baker, Judith Bates, Catherine Bell, Melody Bates, Martha Dominguez, Cheryl Fuller, Laurel Johnstone, Teresa Spencer, Tina Texeira, and Mary Weidmark.” No mention was made of plaintiff Doran (nor plaintiffs Kimberly Baker and Melodie Benton).¹

In subsequent briefing, codefendant NAS noted a discrepancy in the tentative decision:

“[T]he Court stated it would enter judgment against named plaintiff Carolyn Cortina on her individual claims because she did not testify at trial Named plaintiff Kimberly Baker, however, also did not testify at trial. A different class member, Lori Baker, did testify. But Lori Baker is not a named plaintiff. Defendants drafted the [Proposed] Statement of Decision assuming that, consistent with the Court’s decision regarding plaintiff Carolyn Cortina, the Court will enter judgment against named plaintiff Kimberly Baker for the same reason.

“Janet Doran is a named plaintiff. Ms. Doran filed a notice opting-out of class claims. To Defendant’s knowledge, however, Ms. Doran never dismissed her individual claims. Defendants drafted the [Proposed] Statement of Decision assuming that, consistent with the Court’s decision regarding named plaintiff Carolyn Cortina, the Court will enter judgment against named plaintiff Janet Doran.”

On October 20, 2016, the trial court issued a minute order with an attached statement of decision. The statement of decision reads, in pertinent part: “There are several named plaintiffs, two of whom (Carolyn Cortina and Kimberly Baker) did not testify. Judgment against Ms. Cortina and Ms. Baker is to be entered on their individual

¹The trial court’s reference to “Melody Bates” is confusing as nobody by that name is mentioned anywhere else in the record, which includes a 46-volume reporters transcript. In its statement of decision, the trial court referred to “Melody Bates” as a “named plaintiff,” which is not supported by the pleadings. We assume the court intended to refer to Melodie Benton, who testified as a class representative at trial.

claims. The parties have advised the Court that another woman, Janet Dornan [*sic*], was originally a named class representative, but withdrew herself from that position, and also opted out of the class. Her claims are therefore dismissed without prejudice.”

NATC filed a motion to “correct clerical mistakes in the Court’s Statement of Decision.” The motion requested the misspelling of Doran’s name be corrected and the order of dismissal be made *with* prejudice because she “never filed a request to be dismissed as a named plaintiff, and did not appear at trial.” In reliance on Code of Civil Procedure section 581, subdivision (d), NATC argued Doran’s failure to participate in the trial constituted abandonment of her claims.

While its motion was pending, NATC filed a notice of appeal. The trial court subsequently agreed to correct the misspelling of Doran’s name but maintained its position regarding her dismissal. Characterizing her as a “former” class representative, the court stated, “Doran did not abandon her case. She opted not to have her case decided as part of this case. The dismissal without prejudice merely recognizes her status as an opt-out.”

On appeal, plaintiffs’ counsel filed a motion to dismiss on procedural grounds. The motion was granted as to two specific issues, but it was denied with regard to the posttrial dismissal of Doran’s claims. NATC thereafter filed its opening brief, which concluded the briefing in this matter.

Plaintiffs’ counsel has advised “that Ms. Doran does not wish to be represented in this matter ..., and that she does not wish to have [counsel] file a Respondent’s Brief on her behalf.” Plaintiffs’ counsel further submits that “Ms. Doran previously gave notice to the Superior Court that she wished to opt out of the above-referenced class-action suit, and she is no longer a member of the plaintiff class therein.”

DISCUSSION

I. Standard of Review

Depending on the circumstances, an order of dismissal is reviewed for abuse of discretion or de novo. (See, e.g., *TracFone Wireless, Inc. v. County of Los Angeles* (2008) 163 Cal.App.4th 1359, 1363 [dismissal based on the sustaining of a demurrer is reviewed de novo]; *Sagi Plumbing v. Chartered Construction Corp.* (2004) 123 Cal.App.4th 443, 447 [dismissal for failure to prosecute is reviewable for abuse of discretion].) “To the extent the trial court’s ruling is based on assertedly improper criteria or incorrect legal assumptions, we review those questions de novo.” (*Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527, 1537.) The propriety of dismissing Doran’s claims without prejudice turns on a question of law, i.e., whether a plaintiff who represents a certified class can unilaterally withdraw from the class action lawsuit. Therefore, the de novo standard applies.

II. Law and Analysis

“Class actions are a form of representative litigation. One or more class representatives litigate on behalf of many absent class members, and those class members are bound by the outcome of the representative’s litigation.” (1 Rubenstein, Newberg on Class Actions (5th ed. 2018) § 1:1.) All class actions begin as lawsuits filed by parties whose claims are purported to be typical or otherwise representative of those of a larger group of people. (See Code Civ. Proc., § 382; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326; *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 875 “[A] plaintiff seeking to maintain a class action must be a member of the class he claims to represent”].) The class representatives are sometimes referred to as “named” plaintiffs. “[W]ithout a named plaintiff there can be no class action” (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804.)

Strictly speaking, there is no class action until the trial court certifies a class. Upon certification, “the court may require either party to notify the class of the action.”

(Cal. Rules of Court, rule 3.766(a).) ““After the members of the class have been properly notified of the action, they are required to decide whether to remain members of the class represented by plaintiffs’ counsel and become bound by a favorable or unfavorable judgment in the action, whether to intervene in the action through counsel of their own choosing, or whether to “opt out” of the action and pursue their own independent remedies’ [Citations.]” (*Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 808, 818 (*Carter*).)

Nonnamed plaintiffs have the ability to “opt out” of a class action. (*Carter, supra*, 224 Cal.App.4th at pp. 817–818; see generally *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 810–811.) Class representatives, on the other hand, owe fiduciary duties to the absent class members. (*Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 273.) “The representative parties not only make the decision to bring the case in the first place, but even after class certification and notice, they are the ones responsible for trying the case, appearing in court, and working with class counsel on behalf of absent members.” (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1434.) “Even if the named plaintiff receives all the benefits that he seeks in the complaint, such success does not divest him of the duty to continue the action for the benefit of others similarly situated.” (*La Sala v. American Sav. & Loan Assn., supra*, 5 Cal.3d at p. 871; accord, *Barboza v. West Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540, 546–547 [“the representative plaintiffs ... owe absent class members a fiduciary duty to protect the absentees’ interests throughout the litigation”].)

Because named plaintiffs in a certified class action owe fiduciary duties to the classes they represent, such individuals cannot unilaterally withdraw from the lawsuit. This principle is implicit in the language of rule 3.770 of the California Rules of Court (rule 3.770): “A dismissal of an entire class action, *or of any party* or cause of action in a class action, requires court approval. ... Requests for dismissal must be accompanied by a declaration setting forth the facts on which the party relies.” (*Id.*, subd. (a), italics

added; see *Pirjada v. Superior Court* (2011) 201 Cal.App.4th 1074, 1085 [noting the requirement of court approval serves to protect absent class members].)

According to its statement of decision, the trial court dismissed plaintiff Doran's claims without prejudice because it believed she "was originally a named class representative, but withdrew herself from that position, and also opted out of the class." As we have explained, the only way for a named plaintiff to voluntarily withdraw from a certified class action is to comply with rule 3.770. When NATC argued this point, the trial court maintained Doran had chosen to "opt-out of the class action" and cited "case law on the subject of former class representatives." The authorities upon which the trial court relied are inapposite for several reasons, but mainly because Doran was not a "former class representative."²

In briefing below, plaintiffs' counsel argued "the act of opting out removes an individual from membership in the class, [and] that individual, by operation of law, must also cease to be a class representative." The authority cited for this proposition, *Carter*, *supra*, 224 Cal.App.4th at page 818, is wholly unsupportive. The *Carter* opinion does not discuss the circumstance of a named plaintiff ceasing to be a class representative, much less suggest a class representative can withdraw from a class action by simply expressing a desire to "opt out" of the litigation. Rule 3.770 would be rendered meaningless if such a procedure were permitted.

Although not confirmed by the record, NATC implies Doran submitted an opt-out request to a third party class administrator in approximately 2011. Assuming this occurred, and even assuming her actions could be construed as a request for dismissal,

²The cited authorities consisted of *Catlin v. Wal-Mart Stores, Inc.* (D. Minn. 2015) 123 F.Supp.3d 1123, *Tardiff v. Knox County* (D.Me. 2009) 598 F.Supp.2d 115, and *Tardiff v. Knox County* (D.Me. 2008) 247 F.R.D. 225. NATC seems to read the trial court's brief discussion of *Catlin*, and certain aspects of its statement of decision, to imply the statute of limitations for Doran's claims was tolled until the date of the challenged order. NATC argues at length that such a conclusion should be rejected. Since we disagree with the trial court's characterization of Doran as a former class representative, we view the tolling issue as moot and do not reach the merits of NATC's argument.

the request “was not self-executing, and, in fact, was only the first step in a process that requires court approval of any such dismissal.” (*Pirjada v. Superior Court*, *supra*, 201 Cal.App.4th at pp. 1086–1087, citing rule 3.770(a).) Code of Civil Procedure section 581d additionally requires a dismissal to “be in the form of a written order signed by the court and filed in the action” and “entered in the clerk’s register” Unless the trial court had already dismissed Doran as a class representative, which it does not appear to have done, her tendering of an opt-out request to a third party class administrator had no legal effect.

Furthermore, it appears plaintiffs’ counsel remained Doran’s attorneys of record throughout trial. From certain changes in the pleadings over time, we can surmise the relationship between Doran and her counsel deteriorated prior to trial. However, the register of actions shows neither a pretrial dismissal of her UCL claim nor the filing of a substitution of attorney notice.³ (See Code Civ. Proc., § 284; *People v. Metrim Corp.* (1960) 187 Cal.App.2d 289, 294 “[The real purpose of the [substitution] procedure ... is to have the record of representation clear”].) In contrast, as noted by NATC, plaintiffs’ counsel had previously filed a request for dismissal of named plaintiff Robin Johnson, which the trial court granted in 2011.

In summary, it was not possible for plaintiff Doran to withdraw from the case as a class representative without obtaining court approval pursuant to rule 3.770. Therefore, she remained a named plaintiff throughout trial. Her status in that regard appears indistinguishable from that of Carolyn Cortina and Kimberly Baker, i.e., the plaintiffs against whom the trial court deemed it appropriate to enter judgment in favor of NATC. Since the trial court’s dismissal of Doran’s claims without prejudice was based on an erroneous legal assumption regarding her power to unilaterally cease to act as a class representative, we will reverse the order and remand for further proceedings. On remand,

³As previously mentioned, all other claims in the second amended complaint were dismissed with prejudice shortly before trial.

the trial court shall reconsider NATC's request for entry of judgment against Doran for failure to prove her case, and, if necessary, its alternative request for an order dismissing Doran's claims with prejudice. (Cf. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 448 [discretionary denial of class certification reversed due to trial court's reliance "upon improper criteria and incorrect legal assumptions," with instructions to reconsider the issue on remand].)

DISPOSITION

The order dismissing the claims of Janet Doran without prejudice is reversed. The matter is remanded for further proceedings consistent with this opinion, which shall include (1) reconsideration of the request for entry of judgment against Doran and in NATC's favor with regard to Doran's claims, and, if necessary, (2) NATC's alternative request for dismissal of Doran's claims with prejudice.

Pursuant this court's opinion issued on November 7, 2017, plaintiffs shall recover their costs on the partially successful motion to dismiss. The parties shall otherwise bear their own costs on appeal.

PEÑA, J.

WE CONCUR:

LEVY, Acting P.J.

FRANSON, J.